



AABA

ALLEN, ALLEN,  
BREELAND & ALLEN PLLC



---

**GRIFFITH & CARR**  
ATTORNEYS AT LAW



# Personnel Administration and County Government

# Personnel Issues

- ❖ Six Primary Areas:
  - ❖ At-Will Employment
  - ❖ Title VII
  - ❖ ADA
  - ❖ ADEA
  - ❖ FMLA
  - ❖ FLSA

# At-Will Employment

- ❖ Mississippi is an at-will employment state.
  - ❖ In Mississippi when there is no written employment contract the employment relationship is at will.
    - ❖ *Galle v. Isle of Capri Casinos Inc.* 2015 W.L. 4451187(Miss.)
- ❖ This means an employer can fire an employee for a good reason, a bad reason or no reason at all.
  - ❖ *Kelly v. Mississippi Valley Gas Company* 397 So. 2d 874,875(1981)
- ❖ Simply put, at will employees work “at the will and pleasure” of the employer.

# At-Will Employment

- ❖ At-will employment however does have limitations
  - ❖ Federal Law
  - ❖ *McArn*

# At-Will Employment Federal Law

- ❖ The at-will employment doctrine does not allow you to ignore Federal Law.
- ❖ Thus, Federal Laws which prohibit discrimination in hiring and firing are not negated by the at-will employment doctrine.
- ❖ More on this later.....

# At-Will Employment

## McArn v. Allied Bruce-Terminix

- ❖ The primary limitation on the employment at-will doctrine in Mississippi is the “public policy exception” first outlined in *McArn v. Allied Bruce-Terminix Co. Inc.*, 626 So. 2d 603 (Miss.1993)
- ❖ In *McArn* a former termite control employee sued Terminix for wrongful discharge after he was allegedly fired for telling the State Department of Agriculture that certain homes and businesses had not been treated for termites in accordance with state law.
- ❖ The Mississippi Supreme Court held that “an employee who refuses to participate in an illegal act.... shall not be barred by the common law rule of employment at-will from bringing an action in tort for damages against his employer.

# At-Will Employment

## McArn v. Allied Bruce-Terminix

- ❖ In addition, the Court held that an employee who is discharged for reporting illegal acts of his employer is not barred by the employment at-will doctrine from bringing action in tort for damages against his employer.
- ❖ These are referred to as the public policy exceptions to the at-will employment doctrine.

# At-Will Employment

## McArn v. Allied Bruce-Terminix

### ❖ Summary

- ❖ Mississippi employees who are not hired for a specific term are considered at-will employees.
- ❖ At-will employees may be fired for any reason, good reason or bad reason.
- ❖ **HOWEVER**, an at-will employee cannot be fired
  - ❖ In violation of Federal law.
  - ❖ In retaliation for reporting illegal activity; or
  - ❖ Retaliation for refusing to participate in illegal activity.

# Personnel Decisions

- ❖ How County personnel decisions are made depends on whether or not your county is on the beat system or the unit system.
- ❖ **Unit System** – County administrator must deal with all personnel issues.
  - ❖ Unit counties must adopt formal written personnel policies
- ❖ **Beat System** – Individual supervisors may hire, discipline, and fire their own employees.
  - ❖ No requirement for written personnel policies.

# Personnel Policy Manual

- ❖ Board of Supervisors should adopt county personnel policies that are to be followed regardless of whether or not they are beat or unit.
- ❖ Consistency, consistency, consistency

# Personnel Policy Manual

## Personnel Policy Manual – why?

- ❖ Establish the relationship between employer and employee.
- ❖ Provide a degree of certainty.
  - ❖ The policy will outline terms and conditions of employment (set work rules).
  - ❖ Bridge gap in government administration – new officials can know the rules in place when they take office.
  - ❖ Inform the employee of his legal rights and responsibilities.
  - ❖ Provide County with a consistent method for handling personnel matter.

# Personnel Policy Manual

## Personnel Policy Should Include:

- ❖ Terms & conditions of employment (*at will or for cause*)
- ❖ Title VII anti-discrimination statement
- ❖ Harassment & sexual harassment policy
- ❖ Leave policy
- ❖ Grievance policy
- ❖ Drug & alcohol policy
- ❖ Evaluation & discipline policy
- ❖ Discipline Ladder.

# Personnel Policy Manual

- ❖ Should include job descriptions – Important because:
  - ❖ Defines work responsibility.
  - ❖ Defines essential functions of the job.
  - ❖ Defines educational and skill requirements of the job.
  - ❖ Defines expectations of the employer.
  - ❖ It's the backbone of any performance evaluation or discipline process.

# Personnel Policy Manual

- ❖ Notably some County officials are allowed to provide their own personnel policies and make hiring and firing decisions.
- ❖ Examples
  - ❖ Sheriffs
  - ❖ Circuit Clerk
  - ❖ Chancery Clerk
  - ❖ Coroner
  - ❖ Tax Collector

# Hiring Process

## Interview Questions You Should **NOT** Ask

- ❖ Are you married?
- ❖ Do you have children?
- ❖ Are you a U.S. Citizen?
- ❖ Where were you born?
- ❖ How old are you?
- ❖ Do you go to church?
- ❖ Do you have a disability?
- ❖ Ever filed a workers' comp claim?



# Title VII, Civil Rights Act

# Title VII

## Title VII of the Civil Rights Act

- ❖ It shall be an unlawful employment practice for an employer to fail or refuse to hire or to discharge any individual, or to otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment because of such individual's race, color, religion, sex, or national origin.
- ❖ Simply put, Title VII prohibits discrimination based on race color, religion, sex, pregnancy or national origin.

# Title VII

These includes:

- ❖ Discrimination; and
- ❖ Harassment /Hostile Environment

# Title VII

- ❖ Discrimination under Title VII an employee must demonstrate
  - ❖ There are a member of the protected class
    - ❖ Race or gender
- ❖ Was qualified for a position
- ❖ Was subjected to an adverse employment action
  - ❖ Not hired
  - ❖ Fired
  - ❖ Demoted

# Title VII

## ❖ Hostile Environment

- ❖ These claims are based on sexual or racial harassment by co-employees and/or supervisors who subject employees to unwelcome harassment to such an extent that harassment effectes a term condition or privilege of employment.

# Title VII

- ❖ To demonstrate a hostile work environment based on harassment an employee must show
  - ❖ Belongs to a protected group
  - ❖ Was subjected to unwelcomed harassment
  - ❖ Harassment was based on race or gender
  - ❖ The harassment effected a term condition or privilege of employment and
  - ❖ The employer knew or should have known the harassment in question and failed to take action.

# Title VII

- ❖ To determine whether harassment rises to the level to create a hostile work environment courts look at the totality of the circumstances.
- ❖ Perhaps most importantly however are the
  - ❖ Frequency of the harassing conduct
  - ❖ Its severity
  - ❖ Whether it is physically threatening or humiliating.

# Title VII

- ❖ Vigilance is required
  - ❖ If you see discriminatory conduct taking place immediately address it with disciplinary action.
  - ❖ If you hear about or there is a complaint about discriminatory conduct, immediately investigate the same.
- ❖ You will be held responsible in the event that your employees create a environment even if you did not join in.

# Title VII

- ❖ It is important that you have a method for employees to complain about problems on the job including, but not limited to, harassment.
  - ❖ The steps an employee must take to report discriminatory or harassing conduct should be clear to all.
- ❖ It is imperative the county have an anti-harassment policy, *i.e.* a statement saying they are an equal employment opportunity and do not allow for discrimination.



# Americans With Disabilities Act

# Americans With Disabilities Act

- ❖ The ADA makes an unlawful discriminate in all employment practices including but not limited to:
  - ❖ Recruiting
  - ❖ Firing
  - ❖ Hiring
  - ❖ Training
  - ❖ Job Assignments
  - ❖ Promotions
  - ❖ Pay
  - ❖ Benefits
  - ❖ Layoffs
  - ❖ Leave
  - ❖ All other employment related activities

# Americans With Disabilities Act

- ❖ The County cannot discriminate against disabled citizens who are qualified to perform the essential functions of the job with or without an accommodation.
- ❖ An individual has a disability if he or she has a physical or mental impairment which substantially limits a major life activity.
- ❖ Must have a record of such of an impairment or is perceived as having such of an impairment.

# Americans With Disabilities Act

## ❖ Alcohol

- ❖ An alcoholic is protected by the ADA as having a disability.

## ❖ Drugs

- ❖ A drug addict is protected as having a disability only if he or she is receiving recovery treatment and is not a current user.

# Americans With Disabilities Act

- ❖ These accommodations should be considered for applicants and employees who can perform job functions with an accommodation.
- ❖ Accommodations must be reasonable and without “undue hardship.”
- ❖ Notably tolerating poor performance unrelated to a disability is not an accommodation that must be made.



# Age Discrimination in Employment Act

# Age Discrimination in Employment Act

- ❖ The ADEA protects employees and job applicants who are 40 years or age or older from employment discrimination based on age.
- ❖ Also forbids retaliation against an employee or an applicant who makes a discrimination charge.



# Family Medical Leave Act

# FMLA

- ❖ The FMLA was passed in 1993 to provide leave for certain family and medical circumstances.

# FMLA

## MOST SIGNIFICANT BENEFITS

- ❖ 12 weeks (480 hours) of leave per year
- ❖ Protection of employee's job
- ❖ Maintenance of health insurance benefits while on leave
- ❖ County cannot retaliate against an employee who seeks or takes FMLA leave.
- ❖ THIS DOES NOT REQUIRE PAID LEAVE

# ELIGIBLE EMPLOYEES

- ❖ Employees must have been employed by you for one year.
  - ❖ In particular, employees must have worked 1250 hours within 12 months before starting leave.
  - ❖ Need not be consecutive 12 months.
    - ❖ Ex. Two years ago an employee worked 1200 hours for you, this will count toward his FMLA leave when he is rehired.

# CONDITIONS FOR FMLA LEAVE

## ❖ BIRTH OR ADOPTION

- ❖ Applies to men or women
- ❖ Foster care included
- ❖ Leave usable before or after b/a
- ❖ Leave usable for doctor's appointments, meetings with attorneys, court dates

# CONDITIONS FOR FMLA LEAVE

- ❖ Serious Health Condition

- ❖ Employee, spouse, child or parent

- ❖ Illness, injury or impairment (physical or psychological) **AND**

- (a) inpatient care

- (b) incapacity of or than 3 calendar days

- (c) continuing treatment for chronic/long-term condition

- (d) continuing treatment for condition which, if untreated, causes 30 days absence

- (e) prenatal care

# CONDITIONS FOR FMLA LEAVE

- \* FMLA leave can be taken in a single 12 week period.
- \* Can be taken on an hourly basis.
- \* Can be taken as part time work schedule.
- \* GIVES EMPLOYEE FLEXIBILITY.

# EMPLOYER'S NOTICE DUTIES

- ❖ All employers must display a general notice about the FMLA.
  - ❖ Must display a poster in plain view for all workers and applicators to see notifying them of the FMLA provisions and providing information concerning how to file a complaint with the wage and hour division.
  - ❖ Must be posted even if no eligible employees are then currently employed.

# EMPLOYEE'S DUTIES UNDER FMLA

- ❖ Employee Notice Obligations
  - ❖ Employees requesting FMLA leave must provide verbal or written notice of the leave.
  - ❖ When the need for leave is foreseeable then the employee must provide at least 30 days notice.

# EMPLOYEE'S DUTIES UNDER FMLA

- ❖ Medical Certification Rules
  - ❖ FMLA allows employers to require employees to submit certification of the need for FMLA leave if taking it for a serious health condition they or a family member suffer from.
  - ❖ County must notify employee of need for Medical Certification when County gives written notice of FMLA rights after leave is first requested.

# Miscellaneous - FMLA

- ❖ The law allows employers to require employees to use any paid leave they have as part of their FMLA leave.
- ❖ The law also allows employees to use their PTO during their FMLA leave if the use of the PTO would meet the normal requirements for use, i.e. if the PTO policy allows PTO leave to be used by employee for children who are sick, etc.

# DENIAL OF REINSTATEMENT OF KEY EMPLOYEES ON FMLA LEAVE

- \* Under certain circumstances, County may deny job restoration to “key employees.”
- \* Key employee is
  - \* Salaried
  - \* Highest paid 10 percent of all employees employed by County.

# DENIAL OF REINSTATEMENT OF KEY EMPLOYEES ON FMLA LEAVE

- ❖ Prolonged absence would cause *substantial & grievous economic injury* to employer's operations
- ❖ County must notify employee of intent to fill the position and thereby deny reinstatement [NOTE: Spell out grounds for finding harm]
- ❖ This notice does not constitute termination as the employee is still entitled to work for the employer but the prior position does not have to be held open.



# Fair Labor Standards Act

# What is the FLSA?

- ❖ FLSA = Fair Labor Standards Act
- ❖ Establishes standards for:
  - ❖ Minimum wage
  - ❖ Overtime pay
  - ❖ Employer recordkeeping
  - ❖ Youth Employment

# Who does the FLSA impact?

- ❖ Every employer and every employee, whether in the public or private sector.

# Exempt vs. Non-Exempt Employees

- ❖ Some employees are exempt from minimum wage and overtime provisions of the FLSA.
  - ❖ Examples: administrative, executive, and professional employees; seasonal amusement workers; “small farm” workers; etc.
    - ❖ Administrative
    - ❖ Executive
    - ❖ Professional employees
    - ❖ Seasonal workers
    - ❖ Small farm workers

# Fire protection employees

- ❖ Includes firefighters, paramedics, EMTs, rescue workers who
  - ❖ Are trained in fire protection
  - ❖ Have the legal authority and responsibility to engage in fire suppression
  - ❖ Are employed by a fire department; and
  - ❖ Are engaged in the prevention, control, and extinguishment of fires or response to emergency situations where life, property, or the environment is at risk

# Law Enforcement

- ❖ Law enforcement personnel are employees empowered by State or local ordinance to enforce laws designed to maintain peace and order, protect life and property, and to prevent and detect crimes
- ❖ They have the power to arrest, and have undergone training in law enforcement

# Law Enforcement

- ❖ But what about law enforcement and fire protection employees?
  - ❖ Both are covered by FLSA

# Law enforcement (cont'd)

- ❖ First responders are non-exempt employees, and are therefore entitled to minimum wage (\$7.25/hour).
- ❖ Hours of work generally include all of the time an employee is on duty or at a prescribed work place, as well as those times where the employee “suffered or permitted to work for the employer.”

# Law enforcement (cont'd)

- ❖ Employees covered by the FLSA must receive overtime for hours worked in excess of 40 in a workweek at a rate not less than time and one-half of their regular pay rate.
- ❖ Earnings can be on a piece-rate, commission, salary, or some other basis, but must be computed on the basis of the average hourly rate.

# Overtime

- ❖ At least 70% of claims made by an employee against an employer involve unpaid overtime
- ❖ This is a big problem for public entities, due to budget constraints and a general lack of resources.

# Overtime (cont'd)

- ❖ A BIG trend are actions against sheriff departments.
- ❖ Easy pickings:
  - ❖ Deputies check in and out over the radio or by cell phone
  - ❖ Deputies typically work long hours investigating cases
  - ❖ A few bad apples work off the clock, with very few people knowing that he/she is working

# How to avoid OT claims

- ❖ Develop policies of accountability
  - ❖ Do not let employees use cellphones to clock-in.
  - ❖ The BEST practice is to have them clock-in and -out at the office.
  - ❖ Always make sure that employees are sticking to their schedules.
  - ❖ Do not allow covert or secret work\*

# How to avoid OT claims (cont'd)

- ❖ If employees are not following policies, discipline them.
- ❖ Thoroughly review overtime submissions.
- ❖ Try to avoid the courts. Work with an attorney to create a policy requiring arbitration or mediation.
- ❖ Review OT policies at least twice a year, and **ALWAYS** review them when an administration changes.

# Document retention

- ❖ Certain documents must be kept for 2 or 3 years
- ❖ No particular form for the records, but records must include certain information about the employee and data about the hours worked and the wages earned

# Document retention (cont'd)

- ❖ Employer must maintain records concerning:
  - ❖ Employee's full name and social security number
  - ❖ Address
  - ❖ Birth date
  - ❖ Sex and occupation
  - ❖ Work schedule
  - ❖ Earnings
  - ❖ Pay schedule
  
- ❖ The length of time for document retention varies.

# Document retention (cont'd)

- ❖ Documents to be kept for three years
  - ❖ Payroll records
  - ❖ Collective bargaining agreements
  - ❖ Sales and purchase records
  
- ❖ Documents to be kept for two years
  - ❖ Time cards
  - ❖ Piece work tickets
  - ❖ Wage rate tables
  - ❖ Work and time schedules
  - ❖ Records of additions to or deductions from wages

# What happens if you violate the recordkeeping requirements?

- ❖ The good news: there is no personal cause of action for recordkeeping violations under the FLSA (yet).
- ❖ The bad news: the Department of Labor can initiate its own investigation, find a violation, and fine you up to \$1,100 per violation.